

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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16-CV-4756 (NGG-JO)

MAKE THE ROAD NEW YORK and
MARTIN JONATHAN BATALLA VIDAL,

Plaintiffs,

United States Courthouse
Brooklyn, New York

-against-

September 14, 2017
2:30 p.m.

KATHY A. BARAN, ET AL.,

Defendants.

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TRANSCRIPT OF CIVIL CAUSE FOR PRE MOTION CONFERENCE
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
UNITED STATES SENIOR DISTRICT JUDGE
UNITED STATES MAGISTRATE JUDGE JAMES ORENSTEIN

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GEORGETTE K. BETTS, RPR, CSR
Official Court Reporter

1 THE COURT: You may be seated in the back and on the
2 side. Call the case, please.

3 THE COURTROOM DEPUTY: Everybody on the Vidal matter
4 please state your appearances for the record.

5 THE COURT: All right. For the plaintiff.

6 MR. WISHNIE: Good afternoon, Your Honor, for
7 plaintiffs, Michael Wishnie, Jerome N. Frank Legal Services
8 Organization, Yale Law School. With me today is law student
9 intern, Susanna Evarts. Ms. Evarts will be prepared to
10 address the Court regarding the claims set forth in our
11 filings.

12 Attorney Karen Tumlin of the National Immigration
13 Law Center will be prepared to address the Court regarding
14 case management and scheduling, any matters like that. I'll
15 invite everybody else to introduce themselves.

16 THE COURT: That's fine, please go ahead.

17 MR. COX: Justin Cox with the National Immigration
18 Law Center.

19 MS. JOACHIN: Mayra Joachin, National Immigration
20 Law Center.

21 MS. HANSON: Jessica Hanson, National Immigration
22 Law Center.

23 MS. TAYLOR: Amy Taylor, Make The Road New York.

24 MS. ORIHUELA: Marisol Orihuela, Jerome N. Frank
25 Legal Services Organization.

1 MR. AHMAD: Muneer Ahmad, Jerome N. Frank Legal
2 Services Organization.

3 THE COURT: Thank you. Yes.

4 MS. RILEY: Good afternoon, Your Honor, Susan Riley,
5 chief of the civil division in the U.S. Attorney's Office.

6 THE COURT: Nice to see you again, Ms. Riley.

7 MS. RILEY: Thank you, Your Honor.

8 I'd like to introduce to you our Deputy Assistant
9 Attorney General for the civil division in Washington, D.C.,
10 Brett Shumate. He will be presenting the government's
11 arguments today.

12 Also at counsel table is John Tyler, an assistant
13 director in the Federal Programs Branch in the civil division
14 Department of Justice in Washington, D.C. With us also is
15 Brad Rosenberg, also of the Federal Programs Branch of the
16 civil division in Washington, D.C. Lastly, but not least, Joe
17 Marutollo of our offices, USAO office, chief of immigration
18 litigation.

19 THE COURT: He has replaced Mr. Dunn?

20 MS. RILEY: Yes, he has, Your Honor.

21 THE COURT: Who has taken the bench in New York
22 City.

23 MS. RILEY: Yes, he has.

24 THE COURT: How nice for him.

25 MS. RILEY: Yes, it is, Your Honor.

1 THE COURT: All right. It's nice to see every one
2 from out of town, New Haven and Washington.

3 With me is Magistrate Judge James Orenstein, who is
4 also assigned to this case and we thought for the purposes of
5 efficiency the two of us would preside over this proceeding.
6 You may be seated.

7 This case was brought last year and it was, in
8 effect, stayed while the political process continued and here
9 we are on September 14th, 2017, and we've been asked by the
10 plaintiffs to file a second amended complaint.

11 So why don't we start with the application made by
12 the plaintiff.

13 MS. EVARTS: Good afternoon, Your Honor, thank you.
14 I would like to first start by introducing my client, Martin
15 Batalla Vidal and many members of Make the Road New York who
16 are with us today.

17 THE COURT: Where is your client?

18 MR. VIDAL: Right here, Your Honor.

19 THE COURT: Nice to meet you.

20 MS. EVARTS: Second, with your permission, I would
21 like to state the case briefly as we see it.

22 THE COURT: Have you been keeping up with all the
23 news from Washington and Florida that's been articulated by
24 the President in the last 12 hours about this case -- not
25 about this case about the DACA situation?

1 MS. EVARTS: Yes, I have, Your Honor.

2 THE COURT: Okay, fine. I'll be asking the other
3 side a few questions about that. Go ahead.

4 MS. EVARTS: The Trump administration's decision to
5 terminate the DACA program was both heartless and cruel and it
6 was also illegal. The purpose of the Administrative Procedure
7 Act, the APA, is to ensure that when an agency undertakes
8 action that it think through its decision and it think through
9 the cost of taking that action and make a deliberate decision,
10 especially -- this is especially true when people's lives are
11 at stake.

12 THE COURT: They didn't follow the Administrative
13 Procedure Act when the established DACA, did they? That was
14 done without an opportunity for notice and comment, right?

15 MS. EVARTS: That is correct, Your Honor.

16 THE COURT: So going in there hasn't been -- the APA
17 wasn't followed but you're saying they should be following it
18 in connection with the rescission.

19 MS. EVARTS: Yes.

20 THE COURT: Is that it?

21 MS. EVARTS: We are, Your Honor.

22 THE COURT: Okay.

23 MS. EVARTS: And while we fully acknowledge that an
24 agency can change its policy, when it does it needs to be
25 legal, it cannot be pretextual and it needs to be

1 constitutional. The agency has failed all three of those.

2 After its termination of the DACA program, we
3 proposed to amend our complaint in order to bring claims,
4 statutory claims and constitutional claims. Our statutory
5 claims arise under the Administrative Procedure Act and the
6 Regulatory Flexibility Act. And our constitutional claims
7 arise under the equal protection guarantee of the Fifth
8 Amendment along with the due process clause of the Fifth
9 Amendment.

10 And I can describe the claims in more depth if you
11 would like, Your Honor.

12 THE COURT: Well, briefly speaking, you are
13 proposing to amend the complaint, according to your letter, to
14 make certain claims for individuals who are not yet plaintiffs
15 in the case, right?

16 MS. EVARTS: That is correct, Your Honor.

17 THE COURT: And also to make claims on behalf of a
18 class or a number of classes.

19 MS. EVARTS: That is correct, Your Honor.

20 THE COURT: Can you describe the class or classes
21 that you propose to include in your amended complaint.

22 MS. EVARTS: Yes, Your Honor. We propose a
23 nationwide class that would be nationwide. And I can get into
24 more detail. We also expect in our class certification
25 motion, if you grant us leave to amend our complaint, that we

1 will also more fully flesh out the particular aspects of the
2 class that we propose.

3 THE COURT: When could you have this second amended
4 complaint filed so we can move along with this case, and as
5 the government -- as the Attorney General has established
6 certain deadlines for making application to extend these
7 permits.

8 Just state your name for the court reporter.

9 MS. TUMLIN: Absolutely. Karen Tumlin for
10 plaintiffs. Your Honor, the plaintiffs are prepared to file
11 our second amended complaint on Tuesday, the 19th, if that
12 would work for the Court.

13 THE COURT: All right. And so you are pretty far
14 along then in preparing your second amended complaint.

15 MS. TUMLIN: We're working diligently, Your Honor.

16 THE COURT: Okay, well, that's what weekends are
17 for.

18 MS. TUMLIN: Turns out.

19 THE COURT: Let me just ask the government --
20 welcome, first of all, sir.

21 MR. SHUMATE: Thank you, Your Honor.

22 THE COURT: Let me just ask you, are you the career
23 person in your position at the justice department or are you
24 the political appointee?

25 MR. SHUMATE: I'm the political appointee, Your

1 Honor.

2 THE COURT: Which means you know more about what the
3 President is thinking than a career person would.

4 MR. SHUMATE: I don't think you should assume that,
5 Your Honor, but --

6 THE COURT: Okay.

7 MR. SHUMATE: -- I'm the Deputy Assistant Attorney
8 General for the Federal Programs.

9 THE COURT: Well, it is nice to have you here.

10 MR. SHUMATE: Thank you.

11 THE COURT: So I take it from your correspondence
12 that you don't object to the filing of the second amended
13 complaint.

14 MR. SHUMATE: That's correct, Your Honor.

15 First of all, I just wanted to say that we recognize
16 the importance of this case, the significance of the issues
17 that are presented, and the public interest in the case. So
18 we obviously have no objection to the filing of the amended
19 complaint. We see it makes perfect sense to move this case
20 along quickly, so we're not opposing the amended complaint.

21 What the government would be willing to do is file a
22 motion to dismiss within 30 days of when we see the amended
23 complaint. Even though we typically have 60 days, we're
24 willing to move very quickly to put the Court in a position to
25 address what we think are fundamental flaws in the claims that

1 the plaintiffs propose to bring by the end of the year. And
2 as you know, there is a March deadline in DHS's memorandum.
3 In the event the Court does not dismiss the case, we feel the
4 Court should do that, the Court will be able to take some
5 action and we can move to PI briefing potentially next year if
6 the plaintiffs so choose to do so.

7 But we think the best course of action would be, for
8 example, if the plaintiffs were to file the amended complaint
9 next week, we would file a motion to dismiss within 30 days,
10 say October 20th, the plaintiffs could have another 30 days or
11 so to file an opposition, which we would propose
12 November 17th, we would file a reply on December 15th and then
13 the Court could hold a hearing, if it decided to do so, at the
14 end of the year and the Court would be in a position to make
15 the decision on our motion to dismiss end of this year, early
16 next year. So that would --

17 THE COURT: Okay. Let me just ask you this. Isn't
18 there -- there's a first deadline that was set forth by the
19 Attorney General in his statement and that I think was
20 October 5th. What was that deadline for?

21 MR. SHUMATE: So it's actually -- October 5th,
22 that's correct, it is actually a DHS deadline for renewal
23 applications for certain categories of individuals whose
24 permits expire. So, yes, that deadline is upcoming.

25 One thing the plaintiffs had asked us to consider is

1 whether DHS would consider extending that deadline in light of
2 the hurricanes in Texas and Florida. We took that issue very
3 seriously, we took it to DHS, they have considered our
4 request. Their position right now is that that deadline will
5 remain October 5th as of now, but I am authorized to say that
6 they are actively considering whether to extend the deadline
7 in light of the hurricanes. So that's what I know about the
8 October 5th deadline. As of right now, it still stands.

9 THE COURT: I'm more concerned about the October 5th
10 deadline in terms of how it might prejudice the rights of
11 certain persons who are already covered by the DACA
12 certificates or permits, work permits and so on that have
13 already been issued. And so I'm not worried -- I mean, we're
14 all concerned about what has happened with the hurricanes, but
15 if you're living in Michigan or in Oregon or in Vermont, you
16 don't have a problem with the hurricane, you've got a problem
17 with the fact that based on this deadline you may be preempted
18 from making an application to extend the benefit that you
19 received under DACA. So since this is a nationwide program, I
20 think we should just not focus on people in the impacted areas
21 from the hurricanes, we need to focus on everybody. If this
22 is going to be an application for a nationwide class, we have
23 to think of the whole country, so -- and then there's also the
24 question of whether DHS and the immigration officials have the
25 latitude, absent DACA, to grant certain applications

1 irrespective of whether DACA exists and whether this, in
2 effect, creates a legislative rule on the part of DHS that
3 bars people, based on their classification, from being
4 considered for this kind of benefit or remedy or exception to
5 the general rule.

6 I'm just wondering, have you all thought about the
7 question of whether that kind of hard and fast deadline for
8 certain categories of individuals covered by DACA would, in
9 effect, constitute a legislative rule, irrespective of whether
10 the creation of DACA violated that in effect the requirement
11 that legislative rules not be established.

12 MR. SHUMATE: Thank you, Your Honor. We certainly
13 understand the plaintiffs' concern about the October 5th
14 deadline. In DHS's judgment, 30 days was a sufficient amount
15 of time to allow individuals to complete the paperwork to file
16 for renewals. I think there is a virtue in having a clear
17 deadline that people know about, that's clear and why we're
18 reporting. So in their discretion they thought that was
19 appropriate and, in their defense, Your Honor, this is a
20 decision that has been made to wind down the program. It was
21 not an abrupt decision, so the program is not ending
22 immediately. Nobody is losing their DACA benefits
23 immediately. The opportunity has been provided to renew
24 certain applications and so we think that is eminently
25 reasonable.

1 And our position in the case is that this decision
2 to rescind DACA is not subject to judicial review of the APA
3 at all. So it is not subject to the arbitrary and capricious
4 decision-making requirement, it's not subject to notice in
5 common rule making, so this was an eminently reasonable
6 decision that, you know, it's an exercise of prosecutorial
7 discretion. We had to decide how to wind it down in some way,
8 so they felt this was just a reasonable way to establish some
9 deadlines so folks would have clear notice of what the
10 deadlines would be.

11 THE COURT: Well, the Attorney General said in his
12 statement that DACA is unconstitutional and yet in this
13 process you're allowing people to renew, certain people, whose
14 coverage ends by a certain time to renew even though it is an
15 allegedly unconstitutional procedure. Is that what -- do I
16 get that right or do I get that wrong?

17 MR. SHUMATE: That is right. The Attorney General
18 and DHS both decided that this is an unlawful program and what
19 they decided was -- it was a decision based on litigation
20 risk. That if we did not wind down the program in a
21 responsible way it was very likely that the other states were
22 going to go to the Southern District of Texas and ask for an
23 immediate preliminary injunction in which case the program
24 could have been ended immediately. So in their judgment what
25 they decided to do is we're going to have a responsible way to

1 wind this program down that gives folks a chance to know when
2 the deadlines are, gives an opportunity to apply for renewal
3 permits so people aren't losing their benefits immediately.

4 So it was a decision based on litigation risk that if we
5 didn't wind this down in a responsible way, then the District
6 Court in Texas would do it for us.

7 MS. TUMLIN: If I may speak briefly to the
8 October 5th and the notice issue. Leaving aside the
9 tremendous turmoil that states and individuals impacted by the
10 hurricanes but looking at the entire country, one of the
11 things that we're greatly troubled by as plaintiffs and would
12 like to address to the Court is, the renewal process for DACA
13 how it has worked traditionally is 180 days before someone's
14 work authorization in DACA is set to expire they get a notice
15 and that notice directs them to file the renewal application
16 between 120 and 150 days. And those notices -- and I think
17 the government can of course correct me if this is not the
18 case -- have continued to go out, but what that means with the
19 hard and fast October 5th deadline is, individuals whose DACA
20 is expiring between February and March, have received notices
21 that are false and misleading in this context that has
22 changed. They don't state that you only have until
23 October 5th and our understanding is there is no plan to
24 provide individualized notice that provides the right date and
25 provide a warning to individuals that if they don't submit

1 their renewal applications three weeks from today, not in the
2 120- or 150-day window, that they risk losing their chance to
3 renew.

4 THE COURT: I see. So let me just move on to the
5 next question, which is after you file your second amended
6 complaint, assuming that the problem isn't resolved
7 legislatively by the political branches, if you will, of the
8 federal government, between now and October 5th --

9 MS. TUMLIN: Correct.

10 THE COURT: -- then do you anticipate requesting
11 some kind of preliminary injunctive relief? What can we
12 expect, what can the Court expect from the plaintiffs, the
13 new -- the current plaintiff and any additional plaintiffs at
14 that point. I'm just trying to plan for what may happen. My
15 hope would be, frankly, that the executive branch would put a
16 voluntary halt to this, the termination process, to permit
17 Congress and the President to find a legislative solution so
18 the courts are not involved.

19 There are apparently 800,000 individuals who are
20 affected potentially by what's happening with DACA, and that
21 doesn't even cover family members of those people who are also
22 potentially affected. There are people who are working
23 supporting families. We're not talking about people who are
24 children, we're talking about people who are grown and in the
25 work force many, many of them, and they support families, they

1 support their parents, they support their own children some of
2 them. This is a much wider situation than just the
3 individuals. And this affects others as well. They pay
4 taxes, they pay rent, they pay for mortgages, they support
5 their communities, and so I'm concerned, the Court is
6 concerned that the government if it proceeds with these
7 arbitrary deadlines, which is what they are, they are just
8 arbitrary deadlines, that the consequence will be far greater
9 in scope than simply you can't apply and down the road some
10 judge or the Congress will solve the problem and all will be
11 well, all right. We can't expect that in this environment
12 that is a likely outcome. It's a hoped for outcome. And from
13 what the President has said in the last 24 hours, I'm
14 encouraged that this can be resolved by a legislative
15 solution. But you're here because you anticipate that it may
16 not be resolved by a legislative solution. So I'm just
17 wondering whether you have a plan since you're plaintiffs.

18 MS. TUMLIN: Yes.

19 THE COURT: So tell us, give us a little bit of a
20 hint as to where we're going to go from here apart from the
21 filing of a second amended complaint.

22 MS. TUMLIN: Absolutely, Your Honor, I appreciate
23 that. And I'd like to do that in two tracks: One, talking
24 about what the Court might anticipate what plaintiffs' plan
25 might be for the October 5th and then we can turn to the other

1 deadline, which is the March deadline.

2 So with respect to whether any type of injunctive
3 relief or temporary restraining order would be sought in
4 advance of the October 5th deadline, a couple of things would
5 be useful. I think having, first and foremost, a date certain
6 by when the defendants can provide an answer whether the
7 government will voluntarily extend that deadline and perhaps
8 coming back and having another conference when we're closer to
9 that date, perhaps around September the 25th would be amenable
10 to plaintiffs or 26th. We're sitting three weeks today from
11 the deadline for October 5th. But at that point we can make a
12 determination and be ready to set a schedule if we were still
13 in a situation where the defendants had not moved the
14 October 5th date and it became necessary to seek immediate
15 relief. So that would be one plan, Your Honor.

16 We could -- if that became necessary, a need for
17 temporary restraining order that's something we could file on
18 Monday, October the 2nd.

19 THE COURT: So you're saying something like
20 Thursday, September 28th might be a good date?

21 MS. TUMLIN: I was suggesting the Monday or Tuesday,
22 the 25th or 26th for a conference, Your Honor, to see the
23 defendants may have more information at that time and then if
24 we're in resolution, terrific, we can focus on the March 5th
25 date. If not, we could proceed to set a schedule for a

1 temporary restraining order if that's still necessary.

2 THE COURT: Let me hear from the deputy assistant
3 attorney general.

4 MR. SHUMATE: Thank you, Your Honor. We obviously
5 have no objection to coming back for another status
6 conference. I think we can also just engage with the
7 plaintiffs and let them know the government's position or file
8 a letter with the Court letting the Court know what DHS has
9 decided on the October 5th deadline. It may obviate the need
10 for a status conference, I can't speak to that now, it's still
11 actively under consideration.

12 THE COURT: Well, let me say this with great respect
13 for the Department of Homeland Security, that it would be
14 helpful if we could try to avoid judicial intervention in this
15 case if all that it takes, at least at this point, is to
16 extend one deadline, the reason for which is unknown to me and
17 probably unknown to many people, but which is so close in time
18 that taking into account the President's comments where he
19 said in a tweet today -- I do follow the President's tweets --
20 Does anybody really want to throw out good, educated and
21 accomplished young people who have jobs, some serving in the
22 military, question mark. Really. And I think that the
23 message that's being sent is that there is room for a solution
24 and to set -- to keep a deadline that is so close in time to
25 today while a solution is being engineered -- and it's

1 difficult to engineer these solutions for reasons that I need
2 not go into, you can read about them in the media -- that it
3 would be useful to take some of the pressure off the various
4 parties, particularly those who are affected, these people,
5 these good, educated and accomplished young people who the
6 President speaks about with admiration, so that way at least
7 we wouldn't have to deal with a potential judicial
8 intervention at this early stage and we would give the
9 Congress and the President the opportunity to work through
10 some of the difficulties that they may face in engineering the
11 solution. And that's really -- that's the Court's hope. The
12 Court can stay out of this and that the political branches of
13 the government can resolve this. And it would appear there is
14 some progress being made in that regard and DHS I believe
15 would be well served by giving that process the chance to bear
16 fruit.

17 So I wish you would take that back to your client.

18 Who is the secretary of DHS now that General Kelly
19 has become Chief of Staff?

20 MR. SHUMATE: Acting Secretary Duke.

21 THE COURT: You know, General Kelly, according to
22 the Daily News at least, was at the dinner last night at the
23 White House with the democratic leaders of the House and the
24 Senate where the President and leadership, the minority
25 leadership had a discussion about this very issue, so he's

1 very familiar with this situation and I'm sure he could be
2 helpful as well.

3 MR. SHUMATE: Yes, Your Honor, we will absolutely
4 take your concerns back to our clients.

5 I think one thing to keep in mind is if the
6 plaintiffs intend to move for a TRO or a preliminary
7 injunction so close to that October 5th deadline, we do have
8 serious concerns about the merits of their claims. That they
9 are going to ask for that type of emergency relief, they are
10 going to have a show a likelihood of success in the merits,
11 so --

12 THE COURT: I know all the rules.

13 MR. SHUMATE: Right. We think it really makes sense
14 to initiate a briefing schedule on our motion to dismiss so we
15 can get moving quickly to put the Court in a position to
16 address what we think are substantial defects in their claims.
17 So what we would propose --

18 THE COURT: But that motion to dismiss goes beyond
19 October 5th, right?

20 MR. SHUMATE: Yes.

21 THE COURT: The schedule -- we don't even have a
22 motion until when, according to your schedule?

23 MR. SHUMATE: October 20th. But the plaintiffs have
24 not yet indicated whether they for certain intend to move for
25 a TRO or a preliminary injunction before that October 5th

1 deadline. So I think barring some kind of a commitment that
2 they intend to do that, it would be well served and Court
3 would be to go ahead and initiate a briefing schedule on our
4 motion to dismiss.

5 THE COURT: What is the injury to the government in
6 moving the date by which someone would have to apply for a
7 continuation of a work permit, for instance, from October 5th
8 to December 15th for instance, just for the sake of argument?
9 What is the harm that's done in that situation when all it
10 basically does is it affords the Congress during the latter
11 part of this session and the White House to draw up and enact
12 a legislative solution.

13 MR. SHUMATE: The harm would be, Your Honor,
14 interference with a decision that is committed to the
15 executive branch. This is all about prosecutorial discretion.
16 The deferred action is a restraint on deportation. It's a
17 decision not to deport.

18 So if an Article III Court were to second guess the
19 decisions of the executive branch has made about how to
20 exercise its prosecutorial discretion, that would be
21 interference with the executive branch's prerogatives in terms
22 of how it exercises discretion under the immigration laws.

23 THE COURT: Well, I understand that argument and I
24 even made that argument when I was chief counsel of the FAA in
25 Washington from time to time, but the flip side of that is

1 that the President has said that he doesn't want to throw out
2 good, educated and accomplished young people who have jobs,
3 some serving in the military. And so it might appear to be
4 arbitrary and capricious to establish a hard and fast policy
5 that would throw these people out of the country even though
6 they meet all of these wonderful standards that he recognizes
7 and he is, after all, not the Secretary of Homeland Security,
8 he's the president. So his own statements would belie any
9 effort to throw these people out without good cause and it
10 would just seem to be arbitrary and I'm not concluding that,
11 but it could be argued with some merit that it constitutes an
12 arbitrary and capricious act if it doesn't afford the DHS with
13 flexibility where it is a hard and fast rule. And so that's
14 one of my concerns.

15 So take that back to your clients so that they
16 understand that the Court has deep concerns about how this
17 would play out if there isn't some flexibility and movement
18 with regard to this date that's been established for
19 October 5th. That's the only date that I'm concerned about
20 right now.

21 The ultimate outcome of this case should not be in a
22 Court of law in my opinion. It should be handled by the
23 political branches. But if it can't be handled by the
24 political branches, I have an obligation within the law to
25 protect the 800,000 people or at least those who are within my

1 jurisdiction, which could be tens of thousands of people, from
2 any arbitrary and capricious implementation of legislative
3 rule, which this may or may not be.

4 I just want you to understand that in view of where
5 we are today, this afternoon, I don't know about tomorrow,
6 this afternoon it would make sense in my view to be more
7 flexible about the cutoff date so that we could actually
8 resolve this in a more orderly and appropriate way.

9 That's what I would like you to take back to the
10 acting secretary.

11 MR. SHUMATE: Absolutely, Your Honor.

12 THE COURT: Thank you. Judge Orenstein.

13 JUDGE ORENSTEIN: Thank you, Judge Garaufis. I
14 wanted to jump in only because you teed up the issue and it's
15 going to affect something that I'll be addressing when we get
16 to other pretrial matters.

17 I want to understand the harm relating to the
18 October 5th deadline. Are you saying the harm that you're
19 seeking to avoid is not necessarily related to the deadline
20 itself but to judicial control of the deadline?

21 MR. SHUMATE: I would also say that there is a
22 concern that if we start pushing this October 5th deadline
23 back we're going to jam officials at the DHS who process the
24 applications.

25 JUDGE ORENSTEIN: Right.

1 MR. SHUMATE: So they need a certain amount of time
2 to process the flood of applications. I'm not sure exactly
3 how much time they need, but that's something we can talk
4 about --

5 JUDGE ORENSTEIN: That's a separate issue.

6 MR. SHUMATE: Separate issue.

7 JUDGE ORENSTEIN: In terms of the harm arising from
8 the wrong branch of government making the decision, I'm just
9 having trouble understanding what you're saying. Is it that
10 the harm is infringing on the Executive's exercise of
11 prosecutorial discretion as to when to discontinue its
12 exercise of prosecutorial discretion that it believes to be an
13 unconstitutional exercise of that discretion?

14 MR. SHUMATE: That's correct, Your Honor.

15 JUDGE ORENSTEIN: You want to control how long you
16 do something that you believe to be unconstitutional.

17 MR. SHUMATE: Because this is a matter -- the
18 enforcement and --

19 JUDGE ORENSTEIN: Why are you doing something that's
20 unconstitutional at all?

21 MR. SHUMATE: Because the Attorney General decided
22 that it would be harsh -- we'd be in a much different
23 situation if the Attorney General had decided we need to end
24 this program now. We need to wind this down in an orderly
25 fashion. So it wasn't just a decision that DACA is

1 unconstitutional, it was also a policy judgment that in light
2 of the importance of this issue that really Congress should
3 make this decision, we're going to wind this down in an
4 orderly manner rather than just cutting it off tomorrow, which
5 would be -- you know, I'm sure we would be arguing about TRO
6 in a different matter, so --

7 JUDGE ORENSTEIN: But if the judiciary says it's
8 appropriate under applicable law for that process that you
9 believe to be unconstitutional to go longer, that itself is an
10 unconstitutional intrusion on the President.

11 MR. SHUMATE: I think it would be a violation of
12 separation of powers or --

13 JUDGE ORENSTEIN: Thank you.

14 MR. SHUMATE: Yes, Judge.

15 THE COURT: And the other question is, with regard
16 to those whose DACA status expires after March 5th, 2018,
17 those individuals would be barred from applying for a renewal.
18 I don't know where that date came from but that's the other
19 piece of this.

20 MR. SHUMATE: I think --

21 THE COURT: So, in other words, it would be okay to
22 extend someone's coverage by DACA if their status expires
23 before March 5th that would be okay, but it would be
24 unconstitutional and improper to extend someone whose coverage
25 expires after March 5th, 2018.

1 MR. SHUMATE: These are decisions that are committed
2 to the executive branch and the Attorney General and DHS
3 decided that in the exercise of their discretion, they're
4 going to wind down this program that had substantial
5 litigation risk, that they believe as a policy matter really
6 Congress should make this decision. Let's give a six-month
7 window to wind this down in an orderly fashion.

8 Yes, they may seem arbitrary, but these are
9 decisions that are best left by the -- decisions best made by
10 the executive branch because these are competing policy
11 interests. So while they may seem arbitrary in the abstract,
12 these are decisions that have to be committed to the executive
13 branch or else courts are going to be second guessing. If
14 October 5th is arbitrary what's to say that November 5th isn't
15 arbitrary or December 5th isn't arbitrary. So it's entirely
16 reasonable for the government to set a hard deadline, that is,
17 everybody knows about, that folks have 30 days to meet that
18 deadline.

19 So, again, we will go back to DHS and absolutely
20 express the Court's concern about that deadline. But I do
21 believe that that is an eminently reasonable decision to make
22 by the executive branch in their discretion. We're going to
23 wind this down in an orderly fashion, let's set October 5th as
24 the deadline for these renewal applications and March 5th as
25 the deadline to wind down the program altogether.

1 THE COURT: Now you've got a president who has
2 basically said that this is going to affect all these
3 wonderful people and we have to find a legislative solution
4 and you're putting the President, in effect, up against the
5 wall and he's got to solve this problem by a date that's been
6 set by a bureaucrat at the Department of Homeland Security. I
7 don't understand how that makes sense if the President has
8 already stated he's committed to finding a political solution,
9 meaning that the political branches, Congress and the
10 President would find a solution. Isn't it time to go back --
11 and you said you will, but it's not just -- you're not just
12 doing it for the Court, you're doing it for the administration
13 that -- and there are people who, obviously, oppose this kind
14 of solution that the President is hinting at and there's going
15 to be give and take, and the concern of the Court is that
16 October 5th is three weeks away and the date that was set was
17 set before the president made his statements and it would make
18 a lot of sense from various vantage points to extend this
19 deadline. And you know something about deadlines, they can be
20 extended. No one will be harmed by extending this deadline.
21 Certainly not the \$800,000 people who are sweating over
22 whether someone is going to knock on their door and send them
23 to a country they don't even know, where they speak a language
24 they don't even speak.

25 So, on the one hand, those are the only -- they are

1 really the only people who are going to be injured here. The
2 other people who are going to be injured are people who have a
3 political axe to grind or they have a philosophical
4 disagreement or whatever it happens to be, but you can
5 always -- the fact is you can always deport them later if you
6 can't reach an agreement and the courts let you do it. You
7 can always deport them later. And they're not going to object
8 to being here an extra six months or an extra year while you
9 find them.

10 So I don't see what the -- there is no harm done, in
11 the Court's view, by allowing this legislative process to play
12 out and not establishing this October 5th deadline and also
13 barring people whose permits expire after, what is it,
14 March 5th from applying. You can always deny them. You have
15 discretion. And that's another point that has to be made.

16 Even without DACA, the Department of Homeland
17 Security would still have discretion to allow people to remain
18 in the United States. So you don't need DACA for that. DACA
19 established a protocol that helped the people at Homeland
20 Security understand what the priorities of the prior
21 administration were, that's what DACA did. It was not a
22 statute, it wasn't even a formal rule making. So that's
23 another concern -- just add that to my concern for your
24 clients.

25 Is there anything else before we set your schedule

1 for your motion to dismiss?

2 Anything else from the plaintiff?

3 MS. TUMLIN: No, Your Honor, we'd be happy to move
4 on to scheduling on the motion to dismiss and then class cert.

5 THE COURT: Okay. On the motion to dismiss, tell me
6 what your schedule is.

7 MR. SHUMATE: So our thought was as soon as they
8 file the amended complaint we would file our motion to dismiss
9 within 30 days, I think that would probably put us around
10 October 20. The plaintiffs could have 30 days to file an
11 opposition, so around November 17th, and then we could file a
12 reply December 15th and the Court could hold a hearing after
13 that.

14 THE COURT: All right, any disagreement over that,
15 that schedule?

16 MS. TUMLIN: No, Your Honor, that's workable. The
17 one thing plaintiffs would be interested perhaps preceding
18 around the October 20th date would be a meet and confer with
19 the government on a Rule 26 discovery schedule, and then a
20 date to present a report to the Court.

21 JUDGE ORENSTEIN: We'll take that up separately and
22 that's on the agenda for today.

23 THE COURT: Okay. And judge Orenstein will be
24 handling that whole discovery process and he'll go over that
25 with you in a few minutes.

1 MS. TUMLIN: Your Honor, just to clarify, we did
2 have a chance to confer with the defendants that under these
3 dates we think it would be efficient for plaintiffs to be
4 moving on those same dates for our class cert. So on the
5 October 20th date you would receive the motion for class
6 certification from the plaintiffs with the defendants' motion
7 under Rule 12 and then we would oppose and reply on the same
8 dates.

9 THE COURT: Is that agreeable?

10 MR. SHUMATE: Yes, Your Honor.

11 THE COURT: So both sides will be sending me
12 Christmas presents in December.

13 MS. TUMLIN: Many.

14 THE COURT: I want to thank you all.

15 All right. Which brings us to the discovery issue.

16 JUDGE ORENSTEIN: Right. You want to be heard,
17 Mr. Shumate?

18 MR. SHUMATE: Sure.

19 JUDGE ORENSTEIN: Go ahead.

20 MR. SHUMATE: Oh, no, I'm sorry.

21 JUDGE ORENSTEIN: Let me just frame the issue. So
22 as Ms. Tumlin was saying, the issue comes with a Rule 26
23 conference and let me ask you, have the parties conferred
24 already about just the threshold issue of whether there is
25 discovery and what discovery is appropriate at this stage?

1 MR. SHUMATE: Yes, we have.

2 THE COURT: What have you come up with?

3 MR. SHUMATE: Our position is that no discovery is
4 appropriate in this case. The primary claims that are being
5 brought are APA claims, which typically are not susceptible to
6 discovery they're -- the Court makes a decision based on the
7 record that is before the Court, we don't look behind that
8 record. So we have decisions, the Court -- you know, assuming
9 the claims survive a motion to dismiss, the Court will decide
10 whether this action on its face is arbitrary and capricious.
11 So at least for the APA claims we don't think discovery is
12 appropriate.

13 On the constitutional claims, again, we don't think
14 discovery is appropriate. We think those claims are
15 susceptible to a motion to dismiss.

16 JUDGE ORENSTEIN: But typically at least my cases, I
17 know Ms. Riley knows this because I've had the U.S. Attorney's
18 Offices in many cases and some of her colleagues are here,
19 typically the mere fact that the motion to dismiss is not in
20 itself a reason to postpone discovery and, as we've been
21 talking about it at some length today, the parties on both
22 sides, obviously the plaintiffs and the class that they hope
23 to represent and the many government officials who have
24 administrative tasks, they all have an interest in knowing
25 what's coming on October 5th and March 5th. It strikes me

1 that if there is going to be discovery there's going to be
2 little enough time to do it to allow an orderly resolution of
3 the merits.

4 So here's what I'm going to propose. I really don't
5 anticipate we can give you all a fair chance to argue the
6 issue much less have resolve today, but I would like to very
7 quickly we'll set a schedule very quickly to confer about this
8 and tee up with your respective positions in letters two
9 things: One, the threshold issue of whether discovery should
10 proceed and, second, this will require a real meet and confer,
11 assuming that it does, what it should look like, what
12 deadlines we should set, how if at all it should be phased.
13 To the extent it goes forward there are going to be, I'm sure,
14 some very contentious issues because I know you want to rely
15 on a very concrete administrative record, I imagine you want
16 to get into the intent of various actors and that will
17 implicate the question of depositions. Please identify the
18 issues that are going to divide you and come up with a
19 proposal for getting done what you would agree has to be done
20 if discovery goes forward and what issues need to be resolved,
21 because we need to address them quickly.

22 MR. SHUMATE: Your Honor, we will certainly do that.
23 I would just say here that the government will strongly oppose
24 any discovery here and to the extent the Court wants to move
25 quickly and plaintiffs want to move quickly, any attempt to

1 get discovery of cabinet officials is going to be strongly
2 opposed by the government.

3 JUDGE ORENSTEIN: I anticipate that there are a lot
4 of contentious issues here, I'm not making an assumption one
5 way or the other about how they play out, but if the parties
6 are going to get the rulings that they need in time to have a
7 practical effect, we're going to have to have those discovery
8 issues resolved quickly. So I want you to get started on
9 meeting and conferring.

10 Unless there's an objection to this schedule I'd
11 like to have your respective positions, I don't care if it's
12 two letters or one, your respective positions on the threshold
13 issue of whether it should go forward by next Friday and so I
14 guess that would be the 23rd, a week from tomorrow.

15 MS. TUMLIN: Twenty-second.

16 MR. SHUMATE: Twenty-second.

17 THE COURT: The 22nd.

18 JUDGE ORENSTEIN: The 22nd, okay. Thank you. I was
19 looking at the wrong date.

20 So by September 22nd your respective positions and
21 accompanying that either a joint proposal or competing
22 proposals for a schedule. To the extent you can identify
23 issues that you agree would need to be decided within a
24 discovery regime and you want to propose dates for getting
25 those done, all the better. And then let's -- I don't know if

1 you want to do this as a joint conference.

2 THE COURT: Yes, what I'm going to do here is I'm
3 setting a status conference for Tuesday, September 26th at
4 4:00 p.m. It would be earlier but I have a -- I'm spending a
5 great deal of time with the criminal division in Washington on
6 a fraud trial next week and the week after and the week after
7 and the week after. So my trial day ends at 4:00 p.m. and
8 we'll take you promptly at 4:00 o'clock.

9 JUDGE ORENSTEIN: We'll address these issues there
10 as well.

11 MR. SHUMATE: Just to be clear, what are we prepared
12 to discuss on the status conference, the discovery issues, the
13 October 5th deadline as well.

14 THE COURT: Oh, yes, absolutely.

15 You're going to tell me all about your discussions
16 with your client, about how cooperative your client is going
17 to be with my suggestion.

18 MR. SHUMATE: I will.

19 JUDGE ORENSTEIN: Anything else that we thought we
20 needed to address in terms of discovery issues that have to be
21 resolved early on.

22 THE COURT: Anything else from the plaintiff?

23 MS. TUMLIN: No, Your Honor.

24 JUDGE ORENSTEIN: Thank you.

25 MS. TUMLIN: Your Honors.

1 THE COURT: Does the plaintiff have anything else
2 for today?

3 MS. TUMLIN: No, thank you, Your Honors.

4 THE COURT: All right. Is there anything else from
5 the defense?

6 MR. SHUMATE: No, Your Honor, thank you both.

7 THE COURT: Thank you very much everyone.

8 (Matter concluded.)

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10 * * * * *

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12 I certify that the foregoing is a correct transcript from the
13 record of proceedings in the above-entitled matter.

14 s/ Georgette K. Betts

September 15, 2017

15 GEORGETTE K. BETTS

DATE

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